STATE OF MICHIGAN

COURT OF APPEALS

JON B. MUNGER, as Personal Representative of the Estate of BARBARA T. McDONALD,

Plaintiff/Counterdefendant-Appellee,

v

ROBERT A. McDONALD III and SHARRON McDONALD,

Defendants/Counterplaintiffs/Cross-Plaintiffs-Appellants,

and

DOUGLAS McDONALD,

Defendant/Cross-Defendant,

and

PATRICIA M. McDONALD, HELEN M. McDONALD, and LESLIE McDONALD,

Defendants.

UNPUBLISHED
April 29, 2003

No. 231737
Wayne Circuit Court
LC No. 00-002421-CH

Before: Hoekstra, P.J., and Bandstra and Saad, JJ.

PER CURIAM.

Defendants Robert and Sharron McDonald appeal as of right from the trial court's order quieting title to certain real property in plaintiff Barbara McDonald and dismissing their' counterclaim for defamation.[1] Defendants also appeal the trial court's order dismissing their

[1] We note that as a result of plaintiff's death on May 23, 2001, the personal representative of plaintiff's estate has been substituted as the appellee in this matter. For purposes of this opinion, however, we will continue to refer to the deceased as "plaintiff."

"counterclaim" against defendant Douglas McDonald for undue influence as frivolous, and awarding $6736 for costs and attorney fees.[2] We affirm the orders quieting title to the subject property in plaintiff and dismissing defendants' claims against both plaintiff and defendant Douglas McDonald, but vacate the trial court's award of costs and attorney fees.

I. Basic Facts and Procedural History

This case arises from a deed executed on June 19, 1996, wherein plaintiff Barbara McDonald and her husband, Robert McDonald II, now both deceased, purportedly quitclaimed their home to their three sons, defendants Robert McDonald III, Douglas McDonald, and Leslie McDonald. Until shortly after the death of Robert McDonald II in April 1999, of the three grantees only Robert McDonald III was aware that the deed had been executed.[3] The remaining grantees learned of the deed's existence only after Robert III objected to an attempt by plaintiff to sell the home in September 1999, citing the June 1996 deed and claiming that the home was not hers to sell. In November 1999 plaintiff, through correspondence from her attorney, denied that she or her husband ever executed the June 1996 deed and requested that Robert III and his brothers execute a deed conveying the property back. After Robert III refused, plaintiff initiated the instant suit by filing a complaint challenging the validity of the deed and seeking to quiet title in her name.[4] In response, Robert III and his wife, defendant Sharron McDonald, filed a counterclaim against plaintiff, alleging defamation stemming from her challenge to the validity of the deed. Defendants also filed a "counterclaim" against defendant Douglas McDonald, claiming that he had exerted undue influence over plaintiff since the death of her husband and had mismanaged her funds under a power of attorney. That claim, however, was deemed by the trial court to be frivolous and was dismissed, albeit without prejudice, before commencement of trial.

Following a bench trial on the remaining claims, the trial court found that, although plaintiff and her husband had in fact executed and delivered the deed, the deed was nonetheless invalid for want of an intent on their part to convey a present interest in the property. The trial court further found that defendants had failed to prove their claim for defamation and, therefore, entered judgment in favor of plaintiff. This appeal followed.

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[2] Defendants acknowledge that their claim against defendant Douglas McDonald was improperly designated as a "counterclaim," as opposed to a cross-claim. However, because that claim was dismissed before amendment of this designation, we refer to the claim as originally filed by defendants.

[3] For ease of reference, Robert McDonald II and Robert McDonald III will hereinafter be referred to simply as Robert II and Robert III, respectively.

[4] Although plaintiff named each of her three sons as well as their wives as defendants in this suit, only Robert III and his wife, Sharron McDonald, claimed an interest in the subject property through the 1996 deed. The remainder of the defendants were included in the suit only because the deed purported to convey to them an interest in the subject property. Accordingly, any further reference to "defendants" in this matter is a reference only to defendants Robert III and his wife, Sharron McDonald.

II. Analysis

A. Validity of the Deed

Defendants first argue that the trial court failed to correctly apply the presumption of intent to pass title that arises from physical delivery of a deed and thus erred, as a matter of fact and law, in finding that although the grantors had executed and physically delivered a deed quitclaiming their home to their three sons, the deed was nonetheless invalid for want of an intent by the grantors to convey a present interest in the property. We disagree.

While actions to quiet title are equitable in nature, and therefore reviewed de novo, a trial court's findings of fact in a bench trial will not be reversed unless they are clearly erroneous. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). In reviewing such findings, however, this Court must give regard to the trial court's superior ability and special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Brooks v Rose*, 191 Mich App 565, 570; 478 NW2d 731 (1991).

In quiet title actions, the plaintiff bears the burden of establishing a prima facie case of title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). Once the plaintiff presents a prima facie case, the defendant then bears the burden of proving superior title. *Id*. In the present case, it was not disputed that plaintiff held title to the subject property before the transaction in question. Therefore, plaintiff met her burden of presenting a prima facie case of title, requiring that defendants prove superior title by establishing the validity of the deed in question. In their attempt to do so, defendants presented substantial evidence that the deed in question had been executed and physically delivered to them. As explained below, however, evidence that a deed has been executed and physically delivered is not sufficient, in and of itself, to establish title.

The primary object of the delivery requirement is to indicate the grantor's intent to give effect to the instrument, i.e., to convey a present interest in the property. *Resh v Fox*, 365 Mich 288, 291; 112 NW2d 486 (1961). The test to determine whether delivery sufficient to pass title has taken place is thus whether the grantor intended to convey a present interest in the land. *Id*. While physical delivery of the deed creates a presumption of such intent, this presumption is not conclusive and may be rebutted with other evidence. *Id*. at 291-292; see also *Tighe v Davis*, 283 Mich 244, 248-249; 278 NW 60 (1938) (physical delivery without the requisite intention does not meet the requirement of delivery so as to validate the deed). Moreover, contrary to defendants' assertion, the only effect of the presumption arising from physical delivery is to cast upon the opposite party the burden of going forward with the evidence. *Hooker v Tucker*, 335 Mich 429, 434; 56 NW2d 246 (1953). The burden of proving the requisite intent to pass title remains with the party relying on the deed. *Camp v Guaranty Trust Co*, 262 Mich 223, 226; 247 NW 162 (1933). Thus, in order to rebut the presumption arising from physical delivery of the deed, plaintiff was required only to put forth some evidence to contradict that the deed was delivered with the intent to convey a present interest in the property. See, e.g., *Lawton v Campau*, 214 Mich 535, 536-537; 183 NW 203 (1921) (grantor's testimony that she did not intend to convey a present interest to the grantee when she recorded deed sufficient to rebut

presumption).[5] Although plaintiff did not herself testify at trial, we conclude that she nonetheless met this burden by putting forth evidence of conduct inconsistent with such an intent following execution and delivery of the deed. See *Resh*, *supra* at 292 ("[t]he subsequent conduct of the parties may be taken into consideration in determining whether there was intention to pass title").

At trial, plaintiff offered evidence that she and her husband continued to live in and pay all expenses for the home following execution of the deed. Plaintiff also presented evidence that close family members, including two of the three grantees themselves, were never informed of the deed's existence. Other evidence offered by plaintiff, and relied on by the trial court in finding a lack of intent to convey a present interest, included a letter written to plaintiff by defendant Robert III in September 1999, wherein he failed to mention the deed alleged by him to have conveyed to him an interest in the home, despite extensive discussion in that letter of other aspects of the planned administration of his parents' estate. Plaintiff also presented a letter from her former attorney wherein it was indicated that the challenged deed was never mentioned by the elder McDonalds when discussing with them estate planning options, "including joint ownership of their home," approximately two years after execution of the deed. Plaintiff also presented evidence that, consistent with this letter, she executed and delivered a deed prepared by her former attorney in April 1999, wherein she conveyed a joint interest in the property to another of her sons only a short while after the death of her husband.

On the basis of this evidence, we find no error of fact or law in the trial court's conclusion that, although the challenged deed was in fact executed and delivered, it was nonetheless invalid for failure of an intent by the grantors to convey a present interest in the subject property. While there was evidence presented at trial that would show that the grantors did so intend, the trial court's finding to the contrary was also supported by the evidence. Consequently, giving due regard to the trial court's superior ability to judge the credibility of the witnesses who testified before it, we are not left with the definite and firm conviction that the trial court made a mistake. *Brooks*, *supra*. In reaching this conclusion, we note that this Court need not determine what the grantors actually intended or what actually occurred at the time the deed was executed on June 19, 1996. Rather, we must simply determine whether the trial court's findings were clearly erroneous and, based on those findings, whether the trial court made the right decision. After review of the entire record, we do not conclude that the trial court's findings were clearly erroneous. Moreover, based on those findings, we find that the trial court correctly disposed of the matter before it.

B. Motions to Dismiss

Defendants next argue that the trial court erred in denying its two motions to dismiss; the first made after plaintiff had rested, the second brought just prior to the testimony of both parties' expert witnesses. Defendants argue that they were entitled to judgment in their favor based on

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[5] Like physical delivery, the recording of a deed by the grantor raises a presumption of intent to pass title. *Gibson v Dymon*, 281 Mich 137, 140; 274 NW 739 (1937). However, as noted by the Court in *Gibson*, this presumption of fact "is but a rule of procedure used to supply the want of facts," and will "never obtain against positive proof." *Id*.

the properly admissible evidence presented by the parties up to these points, and that the trial court therefore erred in failing to grant these motions. Again, we disagree.

Because this was a bench trial, defendants' motions to dismiss are properly treated as a motions for involuntary dismissal under MCR 2.504(B)(2). See *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 235-236, n 2; 615 NW2d 241 (2000). This rule provides that:

> [i]n an action tried without a jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. *The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence.* If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517. [MCR 2.504(B)(2) (Emphasis added).]

As indicated by the language emphasized above, following a motion for involuntary dismissal a trial court has two options: the court "may . . . determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence." MCR 2.504(B)(2). Here, although the trial court did not make clear its reasons for denying the defense motions to dismiss, it is nevertheless clear that at the time these motions were brought significant evidence relevant to the issues being tried had yet to be presented by the parties. At the time of the first motion, the defense had yet to present its case, which was to include testimony from those persons claimed to have witnessed execution of the deed in question. The testimony of these witnesses was highly relevant to the competing claims regarding the validity of the deed, as was the testimony of the parties' handwriting experts, which had not been presented at the time of defendants' second motion to dismiss. Given the relevance of such evidence to the issues being tried, and considering that the choice whether to render judgment or continue on was within the trial court's discretion,[6] we find no error in the trial court's decision to deny either of the two motions to dismiss.

C. Dismissal of "Counterclaim" for Undue Influence

Defendants next argue that the trial court erred in granting defendant Douglas McDonald's motion to dismiss defendants' "counterclaim" for undue influence. In doing so, defendants argue that they were denied due process because they were not served with written notice of the hearing on that motion. Thus, defendants argue, they are entitled to have their claim automatically reinstated. We disagree.

The question whether a party was given notice sufficient to satisfy due process is a legal question reviewed de novo on appeal. See *Vicencio v Ramirez*, 211 Mich App 501, 503-504; 536 NW2d 280 (1995). Due process is satisfied when interested parties are given notice through

[6] See *Port Huron v Amoco Oil Co*, 229 Mich App 616, 631; 583 NW2d 215 (1998) (use of the word "may" indicates a discretionary act); see also *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002) (interpreting the word "may" in court rules to require abuse of discretion standard of review for related issue).

a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond. *Id*. at 504; see also *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995). In this case, although no written notice of the hearing on the subject motion was ever filed or served, defendants were expressly informed of the September 25, 2000 hearing date at the August 14, 2000 hearing on the parties' cross-motions for summary disposition. There, after denying the parties' motions for summary disposition, the trial court took on the issue of scheduling a date for the commencement of trial, as well as deadlines for the completion of discovery and the filing of any additional motions. After the trial court had settled these dates with input from all parties present, including defendant Robert III and his counsel, the trial court expressly scheduled a hearing on defendant Douglas McDonald's motion for September 25, 2000.

We conclude that such express notice of the hearing sufficiently apprised defendants of the proceedings as to satisfy the requirements of due process. *Vicencio*, *supra*. In reaching this conclusion, we reject defendants' reliance on MCR 2.119(C)(1), which requires that a party be "served" with notice of a hearing on a written motion at least seven days in advance of the hearing. MCR 2.119(C)(1)(b). Even assuming that this rule requires that written notice of the hearing be supplied, we do not conclude that such a procedural error warrants reversal of a trial court's order where, as here, the opposing party had actual notice of the hearing date and the dismissal was granted "without prejudice." See MCR 2.613(A).

We are similarly not persuaded by defendants' claim that they are without fault in failing to attend the September 25, 2000 hearing because the exact nature of the matters to be considered at that hearing was "confusing." Initially, we note that defendant Douglas McDonald had but one motion before the trial court, that being the motion to dismiss or sever the "counterclaim" brought by the defendants, and thus defendants' claim of confusion regarding the matters to be covered at the hearing must be seen as somewhat disingenuous. Nonetheless, regardless of defendants' understanding of the issues to be determined at the hearing, the fact remains that defendants were in fact apprised that a hearing affecting their interests would be held on September 25, 2000, yet failed to attend that hearing. Moreover, while defendants attribute this failure to attend the hearing to having been informed by an anonymous court employee that the hearing had not been formally placed on the trial court's docket, there is nothing in the record to indicate that defendants attempted to contact counsel for defendant Douglas McDonald to determine whether the hearing, which had been expressly scheduled by the trial court itself, had been adjourned or otherwise cancelled. Accordingly, we will not disturb the trial court's order dismissing defendants' claim for undue influence on these grounds.

Defendants also argue, however, that the trial court erred in granting defendant Douglas McDonald costs and attorney fees on the ground that defendants' "counterclaim" for undue influence was frivolous. On this, we agree.

This Court reviews a trial court's finding that an action was frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A finding is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

MCR 2.625(A)(2) provides that if the court finds that an action or defense is frivolous, it must award costs as provided by MCL 600.2591. Under this statute, costs include "all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." MCL 600.2591(2). Pursuant to MCL 600.2591(3)(a), an action is frivolous if at least one of the following conditions is met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

In dismissing defendants' claim "without prejudice" and awarding costs and attorney fees, the trial court made no findings regarding the existence of the conditions outlined in MCL 600.2591(3)(a). However, it is axiomatic that had the trial court in fact found any of these circumstances to exist, dismissal "with," as opposed to "without," prejudice would be required. Indeed, as this Court has previously noted, "[a] dismissal of a suit without prejudice is no decision of the controversy on its merits." *Stewart v Michigan Bell Telephone Co*, 39 Mich App 360, 368; 197 NW2d 465 (1972), quoting *McIntyre v McIntyre*, 205 Mich 496, 498-499, 171 NW 393 (1919) (Citations omitted). Consequently, given the legal inconsistency of the trial court's ruling, we conclude that the award of costs and attorney fees should be vacated, although without prejudice to defendant Douglas McDonald's right to renew his motion for attorney fees should further proceedings warrant.

D. Exclusion of Opinion Testimony

Defendants next argue that the trial court erred in refusing to permit Robert Rybka, as a witness to execution of the June 1996 deed, to testify regarding his opinion whether it had been "made clear" to the elder McDonalds that they were transferring their home to their three sons. Defendants further argue that Rybka's testimony regarding whether the elder McDonalds "understood what was going on when this transaction took place" was also improperly excluded by the trial court. We agree that the subject testimony was improperly excluded, but find such error to be harmless.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995). Pursuant to MRE 701, laypersons are permitted to testify regarding their opinions or inferences so long as that testimony is "rationally based on the perceptions of the witness and is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Such testimony may also properly take the form of an opinion or inference regarding an ultimate issue to be decided by the trier of fact. MRE 704.

Here, the testimony at issue was to be based on Rybka's opportunity to observe plaintiff and her husband during the June 19, 1996 meeting. This testimony would also have been helpful in deciding a fact at issue in the trial, i.e., whether the couple intended to convey a present interest in the property at the time the deed was delivered. Therefore, the proffered testimony

should have been admitted under MRE 701 as opinion testimony rationally based on Rybka's perceptions. Nonetheless, given defendant Robert III's testimony concerning his extensive discussions with his parents regarding their intent in executing the deed, and considering that a second witness to the deed was later permitted to offer his own opinion that the elder McDonalds in fact understood "that they were deeding there home to the grantees," we conclude that evidence sufficient to support the conclusion sought to be established by defendants through the subject testimony was presented to the trier of fact. Accordingly, exclusion of the subject testimony was not sufficiently prejudicial to warrant reversal. MRE 103(a); see also *Lamson v Martin*, 216 Mich App 452, 459; 549 NW2d 878 (1996) (plaintiff not prejudiced by the improper exclusion of what would have been cumulative opinion testimony).

E. Evidentiary Questions

Defendants next argue that the trial court abused its discretion in permitting defendant Robert III to be cross-examined regarding the content of plaintiff's answers to defendants' interrogatories and "reconstructed" letter. Defendants assert that the questioning was improper because plaintiff failed to establish the authenticity of the documents relied on during such questioning. However, while defendants are correct that the subject documents were never authenticated, defendants cite no authority saying that they could not be properly questioned regarding those writings without those documents having first been admitted into evidence. Cf. *Agee v Williams*, 17 Mich App 417, 425; 169 NW2d 67 (1969) (failure to establish authenticity of interrogatories on cross-examination barred admission of that document into evidence). In any event, we note that questioning regarding the plaintiff's answers to defendants' interrogatories was limited to inquiring whether it was true that plaintiff had denied ever signing the deed or meeting with the deed witnesses for that purpose. As noted by the trial court, the fact that plaintiff denied these things constituted the basis for this suit and, as such the challenged questioning was really "about nothing." Accordingly, we conclude that, even assuming that plaintiff's answers to defendants' interrogatories were not a proper subject of cross-examination, no error requiring reversal exists. MCR 2.613(A).

Questioning regarding the "reconstructed" letter was similarly of no real significance to the ultimate issue at trial. Again, cross-examination concerning the content of this document was limited, addressing only such collateral matters as the extent of the parties' contact with and aid to plaintiff during the period following her husband's death. Moreover, while the trial court indicated that "it would have been helpful to see" this letter, there is no indication that the trial court relied on defendants' testimony concerning that letter in reaching its decision. Indeed, as noted in the discussion under Part II A above, plaintiff presented ample evidence aside from this testimony to support the trial court's ultimate decision here. Accordingly, we similarly conclude that, even assuming questioning regarding the "reconstructed" letter to have been improper, defendants suffered no harm as a result of this claimed error and reversal is, therefore, not warranted. MCR 2.613(A).

Defendants also challenge the trial court's decision to admit handwritten financial ledgers allegedly penned by plaintiff, again arguing the lack of a sufficient evidentiary foundation to support admission. Unlike the documents discussed above, these items were in fact admitted into evidence at trial and were thus clearly subject to the requirement that they be properly authenticated. See MRE 901. However, MRE 901(a) states that the requirement of authentication as a condition precedent to admissibility "is satisfied by evidence sufficient to

support a finding that the matter in question is what its proponent claims." Once there is "some evidence" presented to establish that foundation, a defendant's objection to its sufficiency is properly directed to the weight of the evidence rather than to its admissibility. See *People v Burrell*, 21 Mich App 451, 456-457; 175 NW2d 513 (1970). Here, Douglas McDonald testified that, as plaintiff's son, he was familiar with her handwriting and identified the ledgers as documents prepared in his mother's handwriting, which he had seen her keep for a number of years. Given this testimony, as well as similar testimony later offered by Patricia McDonald and Lisa Mann, the trial court did not abuse its discretion in finding that the ledgers were sufficiently authenticated for admission. See MRE 901(b)(2). The weight to be accorded the evidence in light of defendants' challenge to the authenticity of those documents was a question for the trier of fact. *Burrell, supra*. Accordingly, the trial court did not err in admitting these documents into evidence.[7]

F. Dismissal of Counterclaim for Defamation

Finally, defendants argue that, given the trial court's finding that plaintiff and her husband had in fact executed the June 1996 deed, the trial court erred in dismissing their counterclaim for defamation, which was premised on plaintiff's assertion that the grantors' signatures on the deed had been forged. Again, we disagree.

Initially, we note that defendants have waived this issue by failing to present it in their statement of questions presented, as required by MCR 7.212(C)(5). See *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). Nonetheless, we find this issue to be without merit because, regardless of the trial court's finding with respect to the authenticity of the grantors' signatures, defendants failed to present sufficient evidence to establish a claim of defamation.

In addition to a false and defamatory statement, a successful claim of defamation requires that the plaintiff show fault in the publication of that statement amounting to at least negligence on the part of the publisher. *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 8-9; 602 NW2d 233 (1999). Here, defendants presented no evidence concerning the circumstances surrounding, or the basis for, the ailing, eighty-nine-year-old plaintiff's failure to acknowledge that either she or her husband had executed the deed. Defendant himself testified at trial that he had no idea why his mother had denied the authenticity of her signature, and no other testimony

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[7] Although expressly admitted by the trial court under MRE 406, which allows the admission of evidence concerning a person's habit to prove that the conduct of a person on a particular occasion was in conformity with the habit, the documents were not offered to prove plaintiff's conduct on a particular occasion, but rather to show the plaintiff's finances during the relevant period. Thus, evidence of plaintiff's routine in keeping these records, as testified to by Douglas and Patricia McDonald, merely went to the weight to be afforded the documents, which, as explained above, were themselves admissible under MRE 901 upon testimony from these witnesses that the documents were what their proponent claimed them to be. Accordingly, while the trial court may have erred in citing MRE 406 as a proper basis for admission of the financial ledgers, such error does not require reversal. MCR 2.613(A); see also *Cole v West Side Auto Employees Federal Credit Union*, 229 Mich App 639, 641, n1; 583 NW2d 226 (1998) (this Court will not reverse a decision of the trial court "where it reaches the right result for the wrong reason").

to establish that she was at "fault" in publicly doing so was presented. Accordingly, we find that defendants' counterclaim was properly dismissed by the trial court regardless of the court's determination that the signatures were genuine.

We affirm the trial courts orders quieting title to the subject property in plaintiff and dismissing defendants' claims against both plaintiff and defendant Douglas McDonald, but vacate the trial court's award of costs and attorney fees.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Henry William Saad